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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RISI COMPANIES, LLC, Plaintiff and Appellant, v. ABDOLHAMID RISDANA, Individually and as Trustee, etc., et al., Defendants and Respondents.	G056479 (Super. Ct. No. 30-2015-00771940) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Walter P. Schwarm, Judge. Reversed and remanded with directions.

Phyllis Lamken for Plaintiff and Appellant.

Hammet & Galan and Erik J. Hammett for Defendants and Respondents.

INTRODUCTION

The central question here is what the jury intended when it awarded damages for lost profits, repair costs, and other economic losses in this real estate dispute. Appellant Risi Companies, LLC (Risi), asserts that the jury split the damages award into three parts – one for each of three causes of action – so the amount of the judgment should be the sum of these three parts. Respondents Abdolhamid and Henny Risdana individually and as trustees of the Risdana Family Trust assert the awards were duplicates, and Risi can recover only one amount for each category of damages. The trial court agreed with respondents and entered judgment accordingly.

Prior to trial, the court approved a good faith settlement with other parties. The amount of the settlement exceeded the judgment, so Risi took nothing from the respondents. The trial court found that Risi was therefore not the prevailing party and not entitled to contractual attorney fees. Risi has appealed from the judgment and from the order denying its attorney fees.

We conclude the case must go back to the superior court for a new trial on damages. Evidence in the record supports both interpretations of the special verdicts. They are, in the words of other courts confronted with similar verdicts, "hopelessly ambiguous." We cannot choose one interpretation over the other under these circumstances, so there must be a retrial. The disposition of the attorney fees award must await the outcome of the new trial.

FACTS

Risi bought a house in Laguna Beach from the Risdana Family Trust. The house had several hidden defects, such as a badly cracked foundation and an uninhabitable (because unpermitted) fourth bedroom. The jury determined that the Risdanas (the trustees) knew about and concealed these defects from Risi's principal, Joseph Risi, during negotiations.

The case was tried to a jury in March 2017. Among the causes of action against the defendants were breach of contract, concealment, and failure to disclose.

The jury received 16 special verdict forms. The verdict forms posed identical questions regarding each of the Risdanas and about the Risdana Family Trust for each cause of action against them. For each defendant and for each cause of action, the categories of damages were the same: lost profits, repair costs, and other economic losses.

With respect to breach of contract, the jury found that the Risdanas and the Risdana Family Trust had breached its contract with Risi. The jury awarded no damages against the Risdanas as individuals; it awarded damages against the Risdana Family Trust as follows: $65,766 for lost profits, $23,800 for repair costs, and $5,834 for other economic losses, for a total of $95,400.[1]

With respect to concealment, the jury found that the Risdanas and the Risdana Family Trust knew about the house's defects and concealed them from Risi. Again the jury awarded no damages against the Risdanas as individuals. It awarded the identical amounts for lost profits and repair costs against the Risdana Family Trust as were awarded for breach of contract. The "other economic losses" award was $5,833, for a total of $95,399.

Finally, for failure to disclose, the same pattern held. No damages were awarded against the Risdanas, and the jury awarded the identical amounts against the

[1] Two of the individual amounts are entered incorrectly on the judgment. Lost profits is entered as $65,666, and the amount for other economic losses is entered as $5,843. The total amount of the judgment is correct.

Risdana Family Trust as were awarded for concealment.[2] So the verdict comprised virtually identical amounts for each of three causes of action.

The jurors were clearly concerned about how to deal with damages. During deliberations, they asked three questions on the subject. The first stated, "Please clarify if we find the Defendants in breach, when adding up damages, would it remain one single total or would it multiply due to each Defendant being tried separately?" The court responded, "Please clarify the cause or causes of action to which this request applies."

The jury then asked, "On the list of 'Lost Profits, Repair Costs and Other' for damages due to be calculated seperately [*sic*] for each defendant in question, which would add up to total cost in damages or is the estimated amount the same for each verdict. Just to clarify the amounts being cumulative or seperate per verdict?" Again the court asked for the cause or causes of action to which the question applied.

The jury responded, "If we believe that the plaintiff is owed damages by the defendants in multiple causes, do we determine the damages for each cause separately or put the totals on each verdict? For an example, if we determine one defendant owes lost profits to the plaintiff in both breach of contract and concealment, do we put an amount in breach of contract and a different amount in concealment or do we determine the total amount of lost profits and list that total on both verdicts?" The court's answer was "If the jury believe that Plaintiff is owed damages in multiple causes of action, then the jury should determine the damages for each cause of action separately."

After the jury rendered its verdict, on March 28, 2017, the court questioned the foreperson: "[T]ake a look at Verdict Form Numbers 3, 6 and 9. . . . [¶] . . . [¶] [I]t

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[2] The remaining special verdict forms dealt with negligent misrepresentation and with the Risdanas' cross-complaint for intentional infliction of emotional distress. The jury found in Risi's favor on emotional distress. With respect to negligent misrepresentation, the special verdict form included the following: "Question No. 2: Did The Risdana Family Trust honestly believe that the representation was true when he [*sic*] made it?" [¶] Answer: 'yes' __ or 'no' X [¶] If your answer to Questions [*sic*] No. 2 is 'yes', then answer Question No. 3. If you answered 'no' then do not answer any further questions, and have the presiding juror sign and date this form." Having answered "no," the jury made no further findings for negligent misrepresentation.

lists 'Other economic losses, $5,834.'. . . [¶] . . . [¶] Okay. If you go to Verdict Form Number 6 on page two [concealment], it lists 'Other economic losses' as '$5,833.' And if you go to verdict Number 9 [failure to disclose], under 'Other economic losses,' it lists the amount as '$5,833.' [¶] Was that the jury's intent to make that $1 difference between the amount listed on the Verdict Form Number 3 [breach of contract] and the amounts listed on Verdict Forms Numbers 6 and 9?" The foreperson responded, "Yes. Your Honor, basically what happened is, that's the total we all had together, and we rounded up to $1. So, then, everybody . . . [¶] . . . [¶] divided it, one of them was $1 more than the rest." The foreperson confirmed that the difference in the awards was not a mistake.

Risi filed a proposed judgment on April 26, 2017, specifying a basic award of $286,198 – the total of all the awards for breach of contract, concealment, and failure to disclose. The Risdanas objected in May 2017 on the grounds that this amount represented a triple recovery for the same wrong.[3] Risi argued in response that the jury had awarded separate amounts for separate damages, and the amounts were cumulative, not duplicative.

The court heard the dispute about the judgment on September 26 and took the matter under submission. It ruled on October 10, 2017, that the damage amounts were not cumulative, but rather represented a single amount for each distinct item of compensable damage under three different legal theories. The court denied Risi's motion for entry of judgment consistent with the verdict.

Judgment was finally entered, in the amount of $95,400, on May 1, 2018. Because Risi had settled with the real estate agents involved in the sale for $100,000 prior to trial, the amount of the good faith settlement was offset against the amount awarded at trial, and Risi recovered nothing from the Risdanas or the Risdana Family Trust. After a

[3] The Risdanas' objection to the proposed judgment was the first time the court and the parties focused on the possibility that the jury had awarded duplicate damages.

hearing on contractual attorney fees, the court determined that Risi was thus not the prevailing party and was therefore not entitled to fees.

DISCUSSION

Risi's main issue centers on the special verdict. It asserts the jury's verdict was inconsistent in two ways. First, the jury awarded no damages against the Risdanas individually, although it found that they had breached the contract, concealed information, and failed to disclose information. Second, the damages awarded for each of the three causes of action were cumulative, not triplicates.

I. Damages against Risdanas as Individuals

Risi's argument regarding the omission of damages against the Risdanas individually is meritless for two reasons. First, the special verdicts clearly did *not* include damages against the Risdanas individually, and Risi failed to object to this omission at the time the verdict was rendered and request clarification or further deliberation. The argument is therefore forfeited. (See *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 300; Code Civ. Proc., § 619.)

More importantly, however, if the jury had awarded damages against each of the Risdanas individually *and* against the Risdana Family Trust on the same causes of action, the damages would in each case have unquestionably been duplicative. Regardless of how many people breached it, there was only one contract to breach. Risi presented no evidence that each defendant breached the contract in a different way, causing a different injury. Lost profits, repair costs, and other economic losses would be the same amounts whether they were assessed for breach of contract against Mr. Risdana, Mrs. Risdana, or the Risdana Family Trust. The same is true for concealment and failure to disclose. Risi could not recover the same damages three times. (See *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp*. (2007) 157 Cal App.4th 835, 880 (*OCM*) [award of $0 in damages was jury's effort to avoid double recovery].)

The authorities Risi belatedly cited in its reply brief do not support its argument that these verdicts were erroneous. In some of those cases, the verdict fastened all the liability on one defendant and exonerated another defendant completely, even though the facts were the same. The verdicts in those cases were held to be inconsistent. (*Cavallaro v. Michelin Tire Corp*. (1979) 96 Cal.App.3d 95, 106 [tire manufacturer and tire dealer both liable for defect as matter of law; verdict exonerating one and not the other inconsistent]; *Winkler v. Southern California Permanente Medical Group* (1956) 141 Cal.App.2d 738, 745-746 [claim against employee time-barred; verdict against employer on respondeat superior grounds inconsistent]; *Tolley v. Engert* (1925) 71 Cal.App. 439, 440-441 [if employee exonerated, employer cannot be liable].) Other cases do not address this issue at all. (*Ferroni v. Pacific Finance Corp*. (1943) 21 Cal.2d 773, 780 [judgments against finance company and in favor of car dealer reversed to avoid possibility that no one owned car involved in accident]; *Southern Pacific Co. v. Los Angeles* (1936) 5 Cal.2d 545, 547 [two lawsuits with identical facts tried in different counties reached opposite results].)

In this case, however, the Risdanas were *not* exonerated. The jury found them individually liable on all three causes of action. But it assessed the damages only against the Risdana Family Trust.

The jurors were instructed that "[a] trustee is personally liable for obligations arising from ownership or control of a trust if the trustee is personally at fault. A trustee is personally liable for intentional concealment or negligent misrepresentation committed in the course of administration of a trust if the trustee is personally at fault." Following this instruction, the jury concluded that the Risdanas, as trustees, personally knew about the defects and hid them or failed to disclose them. The Risdanas were therefore "personally at fault" or "personally liable."

As discussed above, however, *damages* for breach of contract and concealment could be awarded only once, not three times. The jury decided to assess all

the damages solely against the Trust, even though the Risdanas were also *liable* for breach of contract and concealment. The jury in *OCM, supra,* arrived at the same solution to the problem of multiple parties and indivisible damages. (See *OCM, supra,* 157 Cal App.4th at p. 880.) We see no error in this solution.

II. Duplicative or Cumulative Amounts

Risi's second argument regarding the "inconsistency" of the special verdict focuses on the amount of the award for each cause of action and the amount of the final judgment. Risi argues that the final judgment should be the sum of the three individual awards.

A court reviewing a special verdict does not imply findings in favor of the prevailing party. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) A reviewing court may not choose between two possible interpretations of an ambiguous verdict. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.)

"[W]here no objection is made before the jury is discharged, it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.]" (*Woodcock v. Fontana Scaffolding & Equip. Co*. (1968) 69 Cal.2d 452, 456-457 (*Woodcock*).)

"If the jury has been discharged and the verdict is 'hopelessly ambiguous,' the judgment must be reversed" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 (*Zagami*)) and a new trial must be ordered. The new trial may, however, be limited to the issue of damages. (*Woodcock, supra,* 69 Cal.2d at p. 457.)

What Risi has categorized as an "inconsistency" is not an inconsistency at all, but rather an ambiguity. Are the amounts awarded as damages for the three causes of

action – breach of contract, concealment, and failure to disclose – cumulative or duplicative?

There is evidence in the record going both ways. On the one hand, all the causes of action are based on the same facts, and it is difficult to see how the amount of the damages for lost profits, repair costs, and other economic losses could be distinct depending on the cause of action.[4] It is particularly hard to see how these categories of damages for concealment could differ from the same categories of damages for failure to disclose. So we can understand why the trial court relied on *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159 ["Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited"] and entered a judgment for $95,400 – to prevent multiple recoveries for the same wrong. (See *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 292-294; cf., *Singh v. Southland Stone, U.S.A., Inc*. (2010) 186 Cal.App.4th 338, 361 ["The jury should be instructed that if it reaches more than one question concerning the amount of damages, the same damages may be included in more than one answer, and that the court, rather than the jury, will resolve any concerns regarding duplication of damages."])

On the other hand, the final question by the jury and the postverdict conversation the court had with the jury foreperson indicate that the jury may have

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[4] The measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) The measure of damages for fraud in the purchase and sale of property is set out in Civil Code section 3343. These damages include "difference between the actual value of that with which the defrauded person parted and the actual value of that which he received," that is, out-of-pocket loss, plus "amounts actually and reasonably expended in reliance upon the fraud" and, under certain specified conditions, "an amount which will compensate [the buyer] for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud[.]" (Civ. Code, § 3343, subds. (a)(1) & (a)(4).) The damages do *not* include "any amount measured by the difference between the value of property as represented and the actual value thereof," i.e., the benefit of the bargain. (Civ. Code, § 3343, subd. (b)(1).) (See *Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 603-604.)

divided a total award among the three causes of action.[5] The presence of a "rounding up" dollar award for "other economic losses" strongly suggests as much.[6]

The jury instructions given at trial do not assist us in resolving the ambiguity. The chief problem is that the damages specified in the jury instructions do not match the damages specified in the special verdict.

To take the breach of contract instruction first, the jury received CACI No. 350, the standard instruction on contract damages. The damages specified in the jury instruction were for "a portion of the purchase price, represented in square footage in the unpermitted room, delay in construction required by Design Review of the unpermitted room, value of the loss of ocean views due to the demolition of deck, cost of demolition of deck , repair of foundation, replacement of foundation, cost of rebuilding the unpermitted room and/or increased interest payments due to delay."[7]

But the special verdict form did not contain any of these categories of damages for breach of contract. The jury was tasked with determining lost profits, repair costs, and other economic losses attributable to breach of contract.

Likewise, for the tort damages, the jury received the first two paragraphs of CACI No. 1920. But instead of using the four categories of damages listed in the CACI instruction,[8] the jury was instructed that "[t]he following are the specific items of damages claimed by [Risi]: [¶] Delays in building, additional Design Review, demolition, repair, and replacement costs to the extent Defendants' false representation was a substantial factor in causing the delays in building, additional Design Review,

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[5] The court should not have had this conversation, but as no one objected, the procedure cannot be challenged now. (See *OCM, supra,* 157 Cal.App.4th at p. 880.)

[6] An award for "other economic losses" of $17,500 divided by 3 equals $5,833.33. Rounding up one award to $5,834 gives the even number.

[7] According to the reporter's transcript, this list of damages was then repeated verbatim.

[8] 1. Difference between what the plaintiff paid and the property's fair market value at the time of sale; 2. Amounts spent in reliance on defendant's failure to disclose; 3. Additional harm arising from failure to disclose; 4. Lost profits.

demolition, repair and replacement costs, and holding costs. [¶] Overpayment of purchase price based on the discrepancy in the square footage, the bonus room [i.e., the fourth bedroom] being uninhabitable, and the loss of view."

The categories of damages specified in the jury instructions do not fit easily with the categories of damages specified in the verdict forms. Which item or items are equivalent to lost profits? Does "delay in construction required by Design Review of the unpermitted room" in the breach of contract damages instruction differ from "delays in building, additional Design Review" in the fraud damages instruction, and, if so, how was the jury to tell the difference? And to which verdict category – profits, repairs, or other losses – do these "delay" damages belong? What is the difference between "repair of foundation" and "replacement of foundation"?[9] No specific category in the verdicts covers the difference between the square footage of the house as represented and the actual square footage. The jury did not receive CACI No. 1923, the instruction on the out-of-pocket rule for property fraud damages.

The court's response to the third jury question does not make the matter any clearer. The question itself is difficult to understand.[10] The court's game effort to respond was, "If the jury believes that Plaintiff is owed damages in multiple causes of action, then the jury should determine the damages for each cause of action separately." This instruction could account for either interpretation of the damages award.

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[9] Joseph Risi testified that Risi was seeking $50,000 in foundation-related damages. He did not distinguish between repair and replacement.

[10] "[I]f we determine one defendant owes lost profits to the plaintiff in both breach of contract and concealment, do we put an amount in breach of contract and a different amount in concealment or do we determine the total amount of lost profits and list that total on both verdicts?" It is unclear how lost profits could be one amount for breach of contract and a different amount for concealment.

We have also examined Joseph Risi's testimony regarding Risi's damages to determine whether this testimony could shed light on a likely total amount.[11] Joseph Risi subtracted the actual square footage of the house from the square footage as represented, multiplied that number by the amount Risi had paid per square foot, and concluded that Risi had overpaid by $197,298. Risi received a bid for $43,900 to rebuild the uninhabitable room, and Joseph Risi testified Risi paid that amount. Repairing the crack in the foundation cost $50,000. Risi claimed $100,000 in damages for "loss of value or loss of profit" arising from having to remove a non-conforming deck with an ocean view. Then there were $71,000 for a year's worth of "holding costs," – including property taxes, additional interest, and insurance – and $43,000 for additional permitting, architectural, and engineering costs. And finally, Risi claimed $27,000 for the cost of rebuilding the deck. The total for all damages was $532,198.

But Risi sold the house for a profit. It paid $1.55 million in 2014 and sold the property two years later for $2.65 million. Joseph Risi testified that profit on the sale, after costs (unspecified), was $200,000. He also acknowledged that he had the house appraised 30 days after Risi bought it in 2014, and it had already appreciated in value by $150,000.

We have labored with various combinations of amounts, trying to match Joseph Risi's testimony regarding damages with the results of the special verdict. (See *Zagami, supra,* 160 Cal App.4th at p. 1094, fn. 8.) The "lost profits" category, $65,766, when multiplied by three yields $197,298, the amount Risi's counsel presented to the jury as the damages for the overstated square footage.[12] But Joseph Risi's only testimony about "lost profits" specified $100,000 in profits lost because the non-conforming deck

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[11] Risi's counsel referred several times during closing argument to the testimony of Tim Simmons and Fred Hufnagel as supporting Joseph Risi's statements regarding damages. Although the court's minute order for March 16, 2017, indicates these two witnesses testified, the record does not contain a transcript of this testimony. Apparently Hufnagel testified as an expert.

[12] Joseph Risi testified that Risi paid $728.04 per square foot for the house, based on the represented square footage of 2,129. The actual square footage was 271 square feet less. 271 times $728.04 is $197,298.

with an ocean view had to be demolished. Did the jury reject that testimony but accept the square footage testimony exactly? In addition, although $65,766 could pass muster as contract damages (assuming it was for the missing square feet), the two identical awards for concealment and failure to disclose, under this theory, would be benefit-of-the-bargain awards and impermissible under Civil Code section 3343, subdivision (b)(1).

We have tried other combinations of amounts from Joseph Risi's testimony to reach the same or similar cumulative amounts for "repair costs" ($71,400) and "other economic losses" ($17,500), but without success.[13] And, of course, there is no way to tell what the jury made of the fact that the house was sold for over $1 million more than Risi paid for it or of Joseph Risi's testimony that Risi's profit from the sale was $200,000.

It is simply impossible to resolve the ambiguity at this remove. Accordingly the matter must be returned for a new trial. This new trial, however, is a limited one. It is concerned *solely* with the amount of damages to be assessed against the Risdana Family Trust for lost profits (if there were any), repair costs, and other economic losses, and *solely* on the three causes of action for breach of contract, concealment, and failure to disclose. The Risdanas as individuals are not parties to this new trial because the jury did not assess damages against them personally, and no other causes of action or items of damages are involved.

III. Remaining Issues

Risi's second issue on appeal – that it had "several items of compensable damages and there was distinct and independent evidence of these different elements" – is rather obscure. The obscurity was deepened by Risi's failure to offer examples of the "different elements" of the "compensable damages" in its opening brief. The reply brief clarified the argument somewhat. Risi seems to mean the jury may have awarded an

[13] For example, Joseph Risi testified that $50,000 was spent to repair the foundation and $43,900 went to repair the uninhabitable fourth bedroom, for a total of $93,900. This is a difference of more than $20,000 in "repair costs" between his testimony and the $71,400 cumulative amount for this category in the special verdict.

amount of damages for, perhaps, repairing the crack in the foundation on the breach of contract cause of action and an entirely separate amount of damages on the concealment cause of action for, perhaps, making the fourth bedroom habitable. Under this theory, no damages would be attributed to breach of contract for making the fourth bedroom habitable, and no fraud damages would be awarded for repairing the crack in the foundation.

If this is the theory, we can say only that it is miraculous that the jury arrived at identical amounts, to the dollar, for lost profits and repair costs for each cause of action and only a dollar difference in the awards for other economic losses. It seems far more likely that the jury made one award for each category. The question is whether the jury intended Risi's total recovery to be $95,400 or $286,200. The issue is moot in any event, as the issue of damages will be retried.

As we are returning the matter for a new trial on damages, it is also unnecessary to consider Risi's third issue, the prevailing party for attorney fees. The determination of the prevailing party must await the outcome of the new trial.

The formulation of the new verdict is a matter for the trial court in the first instance, but we suggest that each category of damages be specified only once, to avoid creating another ambiguous verdict. If there are some types of profits, repair costs, or other economic losses recoverable for breach of contract but not recoverable for fraud in the sale of property, or vice versa, then a more specific category should be used, e.g., "repair costs – breach of contract," and the difference should be brought to the trier of fact's attention. The parties may also consider combining the causes of action for concealment and failure to disclose for purposes of assessing damages, again in order to simplify the outcome. And, of course, the amount of damages would be tried to the court if the parties agree.

DISPOSITION

The judgment is reversed, and the matter is remanded for a new trial on the issue of the damages to be assessed against the Risdana Family Trust for lost profits, if any, repair costs, and other economic losses resulting from breach of contract, concealment, and, if necessary, failure to disclose. Risi is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.